



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL OCEAN SERVICE
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
Silver Spring, Maryland 20910

William L. Sharp
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Dear Mr. Sharp

Thank you for your letter regarding the commencement of the State's review of an applicant's consistency certification under the Coastal Zone Management Act (CZMA) section 307(c)(3)(A) and federal regulations. You asked that the Office of Ocean and Coastal Resource Management (OCRM) confirm in writing agreements made between OCRM and the U.S. Army Corps of Engineers Headquarters (Corps) and the Buffalo District of the Army Corps of Engineers (Buffalo District), regarding the application of consistency to the Millennium Pipeline Company's project. These agreements were made on April 28, 2000, and OCRM relayed the agreements to you by phone the same day. Subsequent to the mailing of your letter, New York received a letter dated April 26, 2000, from the Buffalo District to New York that conflicts with the agreements made between OCRM, the Corps and the Buffalo District. You have now asked that OCRM also respond to the Corps April 26, 2000, letter.

The dispute involves the start of the six-month review period under CZMA section 307(c)(3)(A) (16 USC § 1456(c)(3)(A)) and the interpretation of the six-month review period under both Corps and National Oceanic and Atmospheric Administration (NOAA) regulations. The Buffalo District had taken the position that the six-month review period began on the date of the Corps' Public Notice of Millennium's application to the Corps, March 3, 2000. Such a position is in direct conflict with NOAA's CZMA regulations. To remedy this problem, OCRM's Coastal Programs Division, the Corps, the Buffalo District, and the Corps New York District, discussed the issue on April 28, 2000, and agreed to, or acknowledged, the following:

The Buffalo District's interpretation of the CZMA six-month review period did not fully account for the requirements in NOAA's regulations;

- 2 The Corps will *not* make a determination of when the six-month review period begins, but will, instead, rely on the date determined by New York and OCRM;
- 3 For the sole purpose of the Buffalo District's permit application review, the District will complete its review on September 3, 2000, and if the project meets Corps requirements will issue a "provisional" permit to Millennium;



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4. The provisional permit will not authorize any activity. The provisional permit will not be signed by the Corps. The provisional permit will clearly state that no work may commence until the CZMA consistency review period (as determined by OCRM and New York) ends and New York concurs with Millennium's consistency certification, or, if New York objects, if Millennium appeals the State's objection to the Secretary of Commerce and the Secretary overrides the State's objection. If New York concurs, any conditions required by New York to ensure consistency will be added to the Corps permit; and
5. The CZMA six-month consistency review period for New York should begin when New York receives the Final Environmental Impact Statement (EIS) for the Millennium project, prepared by the Federal Energy Regulatory Commission (FERC).

Regarding the provisional permits described under numbers 3 and 4, above, OCRM had previously determined that such provisional permits are legally permissible under the CZMA. In OCRM's *Federal Consistency Bulletin*, Issue No. 2, at 6 (Aug. 1993), OCRM found that:

the Corps' May 20, 1993, [Regulatory Guidance Letter] on provisional permits does provide clear instructions to provisional permit recipients of the need to obtain state consistency concurrence. Further, a license or permit is defined functionally in CZMA regulations as an approval. 15 CFR § 930.51(c). Thus, technically the Corps' provisional permit is not a permit because it is lacking the requisite approval While we recognize that the Corps' provisional permits are legally permissible, we discourage them as a matter of policy. An alternative that would serve the Corps' needs to eliminate confusion and document delays, but not mislead applicants or hinder state/applicant negotiations, would be to issue a notice, i.e., a postcard, stating that the Corps has completed its review and is waiting for state consistency concurrence. Since, under the current RGL, the applicant has to come back for final Corps approval anyway, there would be no increase in administrative processing.

OCRM has asked that the Corps retract or nullify the April 26, 2000, letter from the Buffalo District to New York and the position that the letter asserts. OCRM has made this request because the interpretation of the CZMA as expressed in the letter is incorrect. In addition the agreements made between OCRM and the Corps on April 28 supercede the views expressed by the Buffalo District. Until the Corps retracts or nullifies the April 26 letter, that letter places a cloud of uncertainty over the agreements made on April 28.

The Buffalo District is not only incorrect regarding the start of the State's review under the CZMA, it appears to be unaware of the CZMA regulations at 15 CFR §§ 930.60, 930.58, and 930.56. While the Buffalo District refers to the Corps' regulations at 33 CFR § 325.2(b)(2)(ii),¹

That regulation states, in part:

Upon receipt of the [consistency] certification, the district engineer will forward a copy of

the Corps has no authority to interpret its regulations in such a manner that undermines the meaning, intent, or application of NOAA's regulations. The Corps cannot abrogate its CZMA consistency responsibilities (and the CZMA responsibilities of applicants). Authority to implement and administer the CZMA is delegated to the Secretary of Commerce and through the Secretary to NOAA. 16 USC § 1463. To meet the requirements of the CZMA, the Corps regulations must be compatible with NOAA's regulations.

NOAA regulations are explicit regarding the six-month review period stating that

State agency review of an applicant's consistency certification begins at the time the State agency *receives* a copy of the consistency certification, *and the information and data required pursuant to § 930.58.*

15 CFR § 930.60(a)(emphasis added). The Buffalo District's April 26 letter states that the CZMA six-month review period for the Millennium project began on the date of publication of the Corps' public notice. This conflicts with both NOAA's and the Corps' regulations, which state that the six-month review period begins on the day the certification is received by the State coastal management agency.

Moreover, the CZMA six-month review period has not yet begun for the Millennium project. Usually, the receipt of the certification and the information required by 15 CFR § 930.58 is sufficient to start the CZMA six-month review period. The necessary data and information required by 15 CFR § 930.58 includes a detailed description of the activity, a brief assessment of coastal effects, and a brief set of findings indicating consistency with the enforceable policies of the State's coastal management program. However, pursuant to 15 CFR §§ 930.58(a)(2) and 930.56(b), a State may describe additional information requirements necessary to determine consistency. If a State has described such requirements, then the six-month review period does not begin until the State receives that information.

the public notice (which will include the applicant's certification statement) to the state coastal zone agency and request its concurrence or objection. If the state agency objects to the certification or issues a decision indicating that the proposed activity requires further review, the district engineer shall not issue the permit until the state concurs with the certification statement or the Secretary of Commerce determines that the proposed activity is consistent with the purposes of the CZM Act or is necessary in the interest of national security. If the state agency fails to concur or object to a certification statement within six months of the state agency's receipt of the certification statement, state agency concurrence with the certification statement shall be conclusively presumed. District engineers will seek agreements with state CZM agencies that the agency's failure to provide comments during the public notice comment period will be considered as a concurrence with the certification or waiver of the right to concur or non-concur.

New York has described additional information requirements pursuant to 15 CFR § 930.56(b). New York requires that:

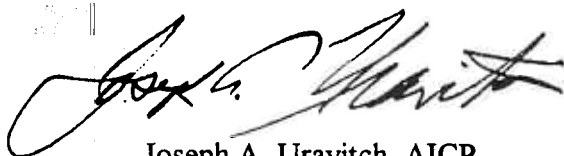
whenever possible, the Department of State will base its consistency determination on documents normally required for compliance with Federal regulations or approval. Generally, these will include environmental impact statements and assessments, applications for Federal permits and licenses, Federal grant applications, and supporting information.

NOAA, *State of New York Coastal Management Program and Final Environmental Impact Statement*, at II-9-13 (Aug. 1982) (Program Document). The State of New York has consistently interpreted this section to mean that applicable Final EISs are "necessary data and information" pursuant to 15 CFR §§ 930.56(b) and 930.58. OCRM has determined that this language in the Program Document meets the additional information description requirements in 15 CFR § 930.56(b). Thus, pursuant to 15 CFR § 930.60, the CZMA six-month review for the Millennium project will begin when the New York Department of State receives the Final EIS for the Millennium project. FERC is preparing the EIS and OCRM understands that the Corps is a "cooperating agency" with FERC and that the EIS will cover the Corps actions as well.

Finally, the Buffalo District's inclusion of the CZMA six-month review period within its public notice comment period is not only inconsistent with the CZMA regulations, as discussed above, but with the Corps regulation that the Buffalo District cites as its authority. See 33 CFR § 325.2(b)(2)(ii), cited above in n.1. The Corps' regulation states that the "district engineer will *seek agreements* with state CZM agencies that the agency's failure to provide comments during the public notice comment period will be considered as a concurrence with the certification or waiver of the right to concur or non-concur" (emphasis added). In order for the Corps to combine the CZMA review within the Corps public notice comment period, the Corps and State must agree to do so, the Corps cannot do so unilaterally.

OCRM will continue to work with the Corps to address this matter and will inform you of any progress. Please contact David Kaiser, Federal Consistency Coordinator, Coastal Programs Division, OCRM, at (301) 713-3098, extension 144, if you have any questions.

Sincerely,



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